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IN THE

Supreme Court of the United States

October Term, 1963.

No. 561

E. NEWBOLD SMITH,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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COMMONWEALTH OF PENNSYLVANIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Petitioner, E. Newbold Smith, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case.

OPINIONS BELOW.

The majority and dissenting opinions of the Supreme Court of the Commonwealth of Pennsylvania are reported at 412 Pa. 1, 192 A. 2d 671 (1963), and are attached hereto as Appendices A and B, respectively. The version of the Supreme Court's majority opinion reported in the official reports contains certain substantial changes from the version originally issued. These differences are shown in Appendix A, pp. 23-24, *infra*. The opinion of the Superior Court of Pennsylvania is reported at 198 Pa. Super. Ct. 499, 182 A. 2d 104 (1962). The opinion of the trial court is not reported, but the applicable excerpts are attached hereto as Appendix C.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on July 2, 1963. A petition for rehearing was filed on July 11, 1963 and was denied on August 7, 1963, Appendix E. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

Petitioner's conviction and jail sentence resulted from a trial at which the State court refused to permit the issuance of a subpoena *duces tecum* directing an FBI agent to produce for inspection by petitioner certain prior statements given by two key Commonwealth witnesses. These statements were clearly relevant to, and allegedly inconsistent with, their direct testimony. The basis of the State's refusal was the State court's belief that there was an absolute federal privilege against disclosure of FBI statements. This refusal avoided (1) a decision by the FBI or the Attorney General of the United States if they would comply with the subpoena, and (2) a court hearing on whether there existed a federal privilege against their production. The Commonwealth's witnesses were put on the stand to testify against petitioner after the Commonwealth knew petitioner would be denied access to the relevant statements. Therefore, the questions presented are:

1. Did it deny due process of law for a State to withhold compulsory process to secure relevant evidence necessary to an effective defense against a State criminal prosecution.

2. Did not the Pennsylvania trial and appellate courts misapply federal law since such law does not confer an absolute privilege on any statement taken by the FBI which prevents a State judge from even examining such a statement to see whether it was either relevant or within the scope of the privilege claimed. See *U. S. ex rel. Touhy v. Ragen*, 340 U. S. 462.

3. Did not the Pennsylvania trial and appellate courts misapply federal law in relying on the representation of an Assistant United States Attorney for the Eastern District of Pennsylvania that the United States would not honor a subpoena to produce FBI statements or witnesses when the relevant Justice Department Order plainly indicated a different course. See Appendix D, pp. 36-38, *infra*.

4. Did not the trial court's erroneous reliance on such junior federal attorney's erroneous representation ripen into a denial of due process of law when, having denied the subpoena *duces tecum*, the trial court permitted the trial to continue; and thereafter permitted the State's two key witnesses, whom Petitioner was seeking to impeach, to testify, which led ultimately to a judgment of conviction.

5. Did not the Pennsylvania courts misapply federal law in failing to follow *Jencks v. United States*, 353 U. S. 657, a decision which compels reversal here either (1) because *Jencks* is itself a statement of the requirements of due process of law, or (2) because it is a statement of a federal policy, or (3) because the *Jencks* remedy of nonprosecution is not relevant in determining whether the federal privilege against disclosure of witness statements given to FBI exists.

FEDERAL CONSTITUTIONAL PROVISIONS AND DEPARTMENTAL ORDER INVOLVED.

The Constitutional provisions and the federal departmental order involved are:

1. Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.*") (Emphasis supplied.)

2. Fourteenth Amendment.

3. A departmental order issued by the Attorney General of the United States, dated May 2, 1939, as supplemented on June 6, 1947, attached hereto as Appendix D.

STATEMENT OF THE CASE.

A commonplace highway incident touched off the events which culminated in the present case. But that minor incident expanded until it involved petitioner in a shocking incident of police brutality. After being stopped in his car at a crossroads by a township policeman, petitioner became embroiled in a fight with the officer, was struck by a blackjack and suffered a broken nose and lacerated scalp (212a).[1] Subsequently, he was taken to the local police station where he was kicked and further beaten by three police officers, including the original officer, and held incommunicado, without medical aid or legal counsel, for a period of over ten hours (251a-252a).

Petitioner complained to the United States Attorney for the Eastern District of Pennsylvania of these violations of his federal civil rights, and the FBI undertook an inquiry. The police officers involved were ultimately indicted under the federal Civil Rights Act and are presently awaiting trial.[2]

Petitioner meanwhile was indicted by the Commonwealth in Chester County, Pennsylvania, on seven bills, including assault and battery. These counts were based both on the fight at the crossroads and on alleged behavior of petitioner at the police station.

At trial on the state indictments, the policeman who had stopped petitioner's car asserted that petitioner had begun the fight at the crossroads by striking first. Petitioner denied this and testified that in fact the policeman had struck him first with a blackjack. The only other persons claiming to have witnessed the crucial events at the beginning of the fight were two women, occupants of a passing car. At trial these women testified that they had

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1. References are to the printed Record submitted to the Superior and Supreme Courts of Pennsylvania.

2. See Indictment No. 20686, United States District Court for the Eastern District of Pennsylvania, Criminal.

seen petitioner strike the first blow.[3] Petitioner sought to impeach this crucial testimony. To do so he attempted to obtain statements concerning the incident which these women previously had given to the FBI during its investigation of the civil rights violation.

Petitioner had good reason to believe that the women made statements to the FBI which were inconsistent with their testimony at trial. The importance of these statements for purposes of impeaching these crucial witnesses is patent. Petitioner's attorneys therefore served upon the Philadelphia offices of the FBI an *ex parte* subpoena *duces tecum* to produce the reports.

The issuance of this *ex parte* subpoena led to a series of events at trial which are of crucial importance to an understanding of how the trial procedure went awry, and deprived petitioner of his federal constitutional rights. The initial subpoena did not comply with a local court rule which forbids issuance without a court order. Unaware of this defect, a Philadelphia representative of the FBI nevertheless appeared in court at petitioner's trial, accompanied by an Assistant United States Attorney for the Eastern District of Pennsylvania. As the trial opened, the Assistant United States Attorney moved to quash the subpoena on the ground, *inter alia*, that to reveal the statements would be "a violation of the security of the office of the Department of Justice" (24a). Counsel for petitioner responded, citing *U. S. ex rel. Touhy v. Ragen*, 340 U. S. 462, for the proposition that, even where the trial involved a violation of state law, papers which the federal government seeks to withhold from an accused should be submitted to the trial judge for his consideration as to their relevance and materiality, and that, in all events, the subpoena should issue. The trial judge, however, ruled: "Not limiting myself to . . . the

3. When petitioner's investigator sought to interview these two witnesses prior to trial, they called the Borough Police Department. Thereafter they refused to give petitioner or his investigator a statement or talk to him, stating that they were acting under the instruction of the police (366a-367a).

rule of court, I am going to allow the motion to quash" (25a).

Counsel then corrected the defect under the local court rule by presenting a formal petition, concededly in proper form under state law, for issuance of the subpoena (19a and 27a). This was submitted before the witnesses took the stand. The trial judge again denied the petition, giving as the "only reason" the fact that the state prosecutor had stated he would make available to petitioner a completely different set of statements taken by the Commonwealth from the same witnesses at a different time (27a).

Petitioner's motion for subpoena *duces tecum* to the FBI was renewed immediately following the crucial testimony of the two women (97a), but the Court stated that it would not reconsider its refusal to grant the motion (98a).

In his opinion denying a motion for a new trial, the trial judge indicated that an Assistant United States Attorney for the Eastern District of Pennsylvania, when in Court, had informed him that under the Department of Justice Order No. 3229, as supplemented, all FBI files are confidential and under no circumstances can be produced or even shown to the trial judge (377a). This statement was clearly erroneous and directly opposite to what the Justice Department Order states. Order No. 3229 provides, *inter alia:*

> "It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

* * *

> "If questioned, the officer or employee should state that the maerial is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." (Appendix D, p. 38, *infra*)

It is also clearly contrary to the federal cases. See pp. 14, 16, *infra*.

Thus, it can be seen that the trial judge quashed the initial subpoena on the ground that it was defective under local rules. But when proper application was made, he nonetheless relied upon the gratuitous opinion of an Assistant United States Attorney from the Eastern District of Pennsylvania present pursuant to the defective subpoena to prejudge the outcome of his issuing a proper subpoena. In refusing to issue the subpoena the trial judge denied petitioner his rights to due process under the United States Constitution.

Ultimately, petitioner was acquitted on six counts, including all those arising from the violence at the police station. But he was convicted of simple assault and battery based on the fight at the crossroads and ordered to pay the costs of prosecution. Any "experienced trial judge and trial lawyer"[4] necessarily would suspect that the crucial testimony of the two women tipped the balance of what would otherwise have been mere contradictory oaths. Petitioner, to whose good character and reputation there was an array of witnesses, was sentenced to a $1,000.00 fine, costs of prosecution and thirty days in prison.

Petitioner's motion for new trial was denied by the trial court. Defendant appealed this order to the Superior Court of Pennsylvania, which on June 13, 1962, affirmed the

4. 353 U. S. at 667 (*Jencks*).

court below. The Supreme Court of Pennsylvania granted *allocatur*[5] and heard the case, stating:

> "We granted allocatur because of appellant's claim that the refusal to issue the subpoena deprived him of due process of law contrary to the decision of the United States Supreme Court in *Jencks v. United States*, 353 U. S. 657 (1957)." 412 Pa. 1, 3 (1963).

The conviction was affirmed by a 5-1 decision, Chief Justice Bell abstaining. Mr. Justice O'Brien, dissenting, declared that petitioner had been denied his federal constitutional right. Appendix B, p. 26, *infra*.

Petitioner and the American Civil Liberties Union presented petitions for reargument to the Supreme Court of Pennsylvania which were denied by *per curiam* orders on August 7, 1963. Thereafter a substantial change was made in the opinion of the Supreme Court. See Appendix A, *infra* pp. 23-24. This petition for a Writ of Certiorari to the Supreme Court of Pennsylvania follows. The petitioner is presently on bail.

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5. See Pa. Act of June 24, 1895, P. L. 212, § 7(e), 17 Pur. Stat. Ann. § 190 which provides that appeal lies to the Supreme Court of Pennsylvania "If the case involves the construction or application of the Constitution of the United States or of any statute or treaty of the United States;"

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Conflicts With Jencks v. United States, a Recent Major Decision of This Court. Whether or Not Jencks Is Thought Applicable to a State Criminal Trial, the Decision Below, Affirming Petitioner's Criminal Conviction, Completes a Denial of Due Process of Law Begun When the Trial Court, Permitting Itself to Be Mislead by a Junior Federal Attorney, Refused a Subpoena Duces Tecum to Compel the Production of FBI Statements of State's Witnesses Necessary to the Defense of a Criminal Prosecution.

The case at bar involves the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian. Particularly involved is petitioner's right to have a subpoena issue to produce FBI statements admittedly relevant to and apparently inconsistent with testimony by key witnesses in a state court criminal proceeding. Also involved is whether the mere assertion of a federal privilege by the FBI agent terminates all judicial inquiry.

1. The requirements of "fundamental fairness" impose upon a trial court the exercise of judgment upon the whole course of proceedings resulting in punishment in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples. *Rochin v. California*, 342 U. S. 165, 169. As a practical matter, fundamental fairness is determined by examining the traditions of English-speaking jurisdictions as expressed in their common law, constitutions and statutes. Those traditions appear to be unanimous in acknowledging the right of an accused to compulsory process for his defense: *e.g.*, U. S. Const. Amend. VI; Calif. Const. Art. 1, § 13, cl. 2.

The act of the trial court below in refusing petitioner's request for a subpoena *duces tecum* to the FBI to produce

clearly described and limited, relevant statements was contrary to this universally recognized principle and constituted a denial of petitioner's constitutional right to due process under the standard of fundamental fairness which applies to state proceedings.

2. In *Jencks v. United States*, 353 U. S. 657, defendant moved for an order permitting his inspection of reports made by a key prosecution witness to the FBI concerning meetings which were the subject of the witness' testimony. The federal trial judge denied the motion without stating his reason. This Court reversed, remanded for a new trial and held:

> ". . . the petitioner *was entitled to an order directing the government to produce* for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." (Emphasis added.) (353 U. S. at 668)

As part of the holding, this Court said that the petitioner was entitled to inspect and use whatever relevant reports he regarded as best for his defense.

Petitioner herein, a state criminal defendant, attempted, just like the defendant in *Jencks*, to subpoena statements given by two key witnesses to the FBI. As in *Jencks*, the trial judge denied the motion. Clearly this refusal of the subpoena conflicted directly with the holding in *Jencks* that the accused therein "was entitled to an order directing the government to produce . . ."

This conflict raises the important and recurring[6] problem of whether the holding in *Jencks* is of constitutional stature or is to be regarded as reflecting some more limited standard of the fair administration of justice ap-

6. See *People v. Parham*, Cal. Sup. Ct., decided September 12, 1963, 32 U. S. L. Week 2137, discussed *infra*, pp. 17-18.

plicable only in the federal courts. The majority opinion in *Jencks* did not provide the answer. Therefore, this significant constitutional question has yet to be expressly resolved. Neither in *Jencks* nor in any other case before this Court has the occasion necessarily arisen for a declaration that the right of compulsory process to obtain such documents is a dictate of the Sixth and Fourteenth Amendments. Nonetheless, there should be no doubt that the part of *Jencks* which requires that the documents be produced is a requirement of due process. Petitioner asks that this Court dispel any misunderstanding, like that of the court below, by a clear declaration in the present case.

Due process is not a static body of rules. The whole thrust of recent constitutional developments in the area of criminal procedure has been to accord a fuller measure of protection to accused persons, to "advance the standards of what is deemed reasonable and right." *Wolf v. Colorado*, 338 U. S. 25. Therefore, whether this Court in *Jencks* was silent on the actual constitutional scope of the decision only because the facts of that case did not require such a characterization—which we contend—or whether the expanding frontier of due process since 1957 has embraced the *Jencks* result—our alternate contention—the result today is the same.

Petitioner's belief that the *Jencks* result—the right to have compulsory process to obtain relevant documents—is a tenet of Fourteenth Amendment due process derives compelling support from the fact that not only is it of fundamental importance in the defense of any criminal charge, but it is embodied in the Sixth Amendment, which requires that the accused in federal criminal prosecutions shall enjoy the right to *both* "compulsory process for obtaining witnesses in his favor,[7] and to have Assistance

7. Documents are comprehended in the phrase "witnesses in his favor" *e.g., United States v. Schneiderman*, 106 F. Supp. 731 (S. D. Cal. 1952), and clearly documents for the purpose of impeaching adverse witnesses are documents "in favor" of the accused.

of Counsel for his defence." Just last Term, in *Gideon v. Wainwright*, 372 U. S. 335, this Court held that the portion of the Sixth Amendment requiring the assistance of counsel was binding upon the states. The guarantee of compulsory process is found in the same sentence and clause of the Sixth Amendment as is the guarantee of counsel and is separated by only a comma rather than the semicolon used elsewhere in the Amendment. As such, it was intended by the framers to have, and should be recognized by this Court as having, equal dignity.

Furthermore, other recent federal decisions, analogous to the present case, indicate conclusively that discovery of certain materials important to the defense of the accused is required in state proceedings under the due process clause of the Fourteenth Amendment. See, *e.g.*, *Brady v. Maryland*, 373 U. S. 83 (suppression of extra-judicial statement in state prosecutor's possession); *United States ex rel. Almeida v. Baldi*, 195 F. 2d 815 (3rd Cir. 1952), *cert. denied*, 345 U. S. 904 (state prosecutor's suppression of potential exhibit); *United States ex rel. Butler v. Maroney*, 319 F. 2d 622 (3rd Cir. 1963) (statement of state witness embodied in extra-judicial statement of defendant must be shown to defendant as well as the witness at trial).

And this Court's decisions increasingly broaden the concept of fundamental fairness and accord fuller protection to accused persons:[8] See, *e.g.*, *Sherman v. United States*, 356 U. S. 369, 384 (opinion by Frankfurter, J.) ("entrapment" and "fundamental fairness"); *Burns v. Ohio*, 360 U. S. 252 (right of indigent defendant to transcript); *Spano v. New York*, 360 U. S. 315 (expanding

8. At least two of the Justices presently on this Court have expressed the view that the Fourteenth Amendment protects from infringement by the states all of the privileges, protections and safeguards granted by the Bill of Rights. See dissenting opinion of Mr. Justice Black in *Adamson v. California*, 332 U. S. 46, 71-72, in which Mr. Justice Douglas joined; and the concurring opinion of Mr. Justice Douglas in *Gideon v. Wainwright*, *supra*.

unconstitutional "confession" rule). Also this Court last Term granted certiorari and set argument for this Term in the case of *Malloy v. Hogan*, Oct. Term, 1963, No. 110, involving the question of whether the self-incrimination prohibition of the Fifth Amendment applies in State Courts.

3. The Supreme Court of Pennsylvania purported to answer the basic constitutional objection which petitioner raises herein by distinguishing the *Jencks* case. First, the Court said:

> "It was the F. B. I. and not the Commonwealth that denied appellant access to the information in question."

This clearly erroneous analysis overlooks the crucial fact that the trial court's denial of a subpoena directed to the FBI was the actual constitutional denial complained of herein. Without a properly issued subpoena there could be no proper action by the FBI or the Attorney General of the United States, either of denial or permission of access. Mr. Justice O'Brien, in dissent from the opinion of the court below, analyzed the problem correctly, stating:

> "We cannot say with certainty that, had appellant been granted a subpoena when he applied for it at the proper time, the Justice Department would have refused to honor it. I believe that due process required the issuance of the subpoena without regard to the speculation as to its reception by the F. B. I."[9] 412 Pa. 1, 10; Appendix B, p. 30, *infra*.

Clearly this is correct. First, the FBI, when properly advised by the Attorney General of the United States, might decide that the "subpoena *duces tecum* will be willingly obeyed," *United States ex rel. Touhy v. Ragen*, *supra*, and make the statements available. Second, as set forth

9. The erroneous conclusion reached in the majority opinion stems from a confusion in reading the opinion of this Court in *Jencks*.

infra, pp. 16-17, it is error to assume that the federal privilege asserted exists in the absolute form assumed by the trial judge. Third, the departmental order only bears on the issue of contempt, and, in any event, authorized that the trial judge be shown the statements. Appendix D, pp. 37-38, *infra*.

Further muddying the waters, the Supreme Court of Pennsylvania moved on to a second point: that the case before it was distinguishable from *Jencks* since petitioner herein had been shown *other* completely separate and distinct statements made at a different time by the key prosecution witnesses to the local District Attorney. For that reason, the Court concluded that petitioner herein, in contrast to *Jencks*, was not harmed by denial of access to the statements made to the FBI. This ground is seriously misleading. It seeks to draw a veil over a violation of petitioner's rights by treating it as "harmless error." Moreover, it is based on the sheerest speculation, since the contents of the statements to the FBI are *ipso facto* unknown, even to the Supreme Court of Pennsylvania. They might contain helpful additional evidence—they were alleged to contain contradictory statements not found in the other statements. In any event, the contents are irrelevant to petitioner's right to compulsory process.[10] Finally, the Court's reasoning would put in the hands of the state prosecutor a convenient and deadly discretionary device for depriving an accused of his constitutional right to obtain statements made by witnesses to the FBI simply by the proffer of some other statement, however unrelated or unhelpful, made to the prosecution by the same witness at a different time and under different circumstances.

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10. Practically speaking, however, statements made to the FBI necessarily have considerable weight and importance. The FBI has formidable prestige and it is a federal offense, punishable by up to ten years imprisonment, to make false statements to an agency of the United States, 18 U. S. C. 80. See *Marzani v. United States*, 168 F. 2d 133 (D. C. Cir. 1948), *aff'd by an equally divided court*, 335 U. S. 895. Pennsylvania law provides no such penalty for statements rendered to State officers.

4. In his opinion justifying the denial of defendant's petition for a subpoena *duces tecum*, the trial judge cited the Justice Department's Order No. 3229, as supplemented, in support of the proposition that "the record disclosed that the Attorney General has not waived the confidential nature of the files." This is not what the departmental order says. Moreover, carried to its logical conclusion, this reveals that the trial judge assumed the FBI alone had the right to determine whether or not the documents sought could be produced and further assumed that he could not issue the subpoena because he was told that the FBI would regard the documents as confidential.

Neither executive privilege [11] nor federal departmental orders, however, can provide an answer to the constitutional question presented herein. Neither can relieve the state court of its constitutional duty to afford the accused his right of compulsory process. Nor can the state judge be relieved of his constitutional duty to determine federal law by relying upon a gratuitous assertion by a federal official prior to the issuance of the subpoena. The FBI's reception of the order is reached *only* after the state trial

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11. The trial judge also confused the privileges applicable to these proceedings. An officer or employee, acting pursuant to Order No. 3229 or a similar governmental order, disobeying a subpoena duces tecum cannot be punished by a state court for contempt upon a showing that he is acting on explicit instructions of his superior: *Boske v. Comingore*, 177 U. S. 459. However, Order No. 3229 does not, as assumed by the trial judge, act as an executive privilege of nondisclosure protecting from judicial perusal and use by the accused of the documents relevant to his defense. In fact, if his superior has not instructed him to withhold the document he must surrender it. *United States v. Burr*, 1807 (C. C. Va.), F. Cas. No. 14694. And his superior, if ordered, might have to surrender the document. Brief of Appellee, p. 49, *Boske v. Comingore, supra*. Also, this Court has left open whether the Attorney General of the United States himself, when properly before the court, can be ordered to surrender the statement on pain of contempt. See concurring opinion of Frankfurter, J. in *Touhy*, 340 U. S. at 470-473.

court has exerted its fullest powers in defendant's behalf.[12] This is correctly explained in Mr. Justice O'Brien's dissent, already quoted above:

> "We cannot say with certainty that, had appellant been granted a subpoena when he applied for it at the proper time, the Justice Department would have refused to honor it. I believe that due process required the issuance of the subpoena without regard to the speculation as to its reception by the F. B. I." 412 Pa. 1, 10; Appendix B, p. 30, *infra*.

5. American courts, under the lead of this Court, are unequivocally committed to the doctrine recently restated in *Ker v. California*, 374 U. S. 23, that "a healthy federalism" requires both federal and state courts to "respect the same fundamental criteria" governing criminal procedure. Yet, the Pennsylvania Supreme Court chose below to fly in the face of this important doctrine by *creating* a variance between Pennsylvania and federal practice in an area where previously state procedure had conformed to the federal. In *Schlesinger Appeal*, 404 Pa. 584, 172 A. 2d 835 (1961), the Supreme Court of Pennsylvania in an opinion by Chief Justice Charles A. Jones[13] had correctly pointed out:

> "Nor is the rule of the *Jencks* case peculiar to federal criminal prosecutions; it is a requirement of due process of law. The appellant has a constitutional right to the production of the reports of the witnesses against him, touching the events and activities to

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12. Ironically, in this case the departmental order actually required that the documents be submitted to the court for determination as to materiality. See Appendix D, pp. 36-38.

13. This great state Chief Justice, now retired, on other occasions has also shown this appreciation of the duty of state judges to follow and apply federal constitutional decisions even though it results in voiding a Pennsylvania state statute. See, *e.g.*, *Commonwealth v. Nelson*, 377 Pa. 58, 104 A. 2d 133 (1954); *aff'd* 350 U. S. 497.

> which they testified . . . Justice required no less in the *Jencks* case, and it requires no less in the instant case." 404 Pa. at 613-14.

The majority opinion below, however, "expressly disapproved" the above language in *Schlesinger*. The Court thereby failed not only to perceive how the conviction it was reviewing deprived petitioner of his constitutional rights, but how its erroneous conclusions would disrupt the sound principles of state-federal harmony announced by Chief Justice Jones in *Schlesinger* only two years before. By granting certiorari to hear the important constitutional claim asserted by petitioner herein, this Court would, in addition, have the significant opportunity to correct the state-federal disharmony gratuitously spawned by the opinion below.

B. The Decision Below Furnishes This Court With an Extremely Opportune Occasion (an Occasion Which It Thought Existed in U. S. ex rel. Touhy v. Ragen When It Granted Certiorari), to Review the Recurring Question of the Impact of Federal Law Investigations on State Criminal Procedure, to the End of Preventing the Recurrence of Situations as Carelessly or Ominously Administered as the One at Bar: If Allowed to Stand, the Decision Below Will Leave State Courts With a Completely False Interpretation of the Executive Privilege of the FBI and the Procedure With Respect Thereto.

The trial judge refused to issue the subpoena under the belief that federal law conferred an absolute privilege on the FBI against the disclosure of any statement even to the trial judge. There is no such absolute federal privilege. And numerous federal cases have denied the existence of an absolute privilege with respect to FBI statements. *Fisher v. United States*, 231 F. 2d 99 (9th Cir., 1956); *United States v. Cohen*, 145 F. 2d 82, 92 (2nd Cir. 1944); *Crosby v. Pacific*

S. S. Lines, Ltd., 133 F. 2d 470 (9th Cir., 1943); *Zimmerman v. Poindexter*, 74 F. Supp. 933 (D. Hawaii, 1947); *Cf. United States v. Beckman*, 155 F. 2d 580 (2nd Cir., 1946); *Campbell v. United States*, 365 U. S. 85.

The basic error is that the court below confused the question of whether an FBI agent who refuses to honor the subpoena can be held in contempt if he pleads the order of his superior with the question of whether the subpoena should issue at all. Clearly the court below would have issued the subpoena if it had not assumed an absolute federal privilege.

This Court, in *United States ex rel. Touhy v. Ragen*, 340 U. S. 462, granted certiorari to determine if the FBI could have the right to refuse production of documents for inspection by the defendant, who had been convicted of violating a state criminal law. After argument before this Court, however, it was determined that the question of absolute privilege was not necessarily reached in *Touhy* and that the sole issue before the Court was whether under the circumstances the FBI agent could be held in contempt because he was merely following the direction of his superiors.

Still open following *Touhy*, therefore, is the question of the extent of the FBI privilege. The grave danger in permitting the decision of the court below to stand arises from the possibility that lower court judges, especially state judges, will come to defer to the considerable prestige of the FBI and refuse to issue a subpoena merely upon the assertion that the FBI might refuse access to the statements of witnesses.

C. Petitioner's Conviction Through the Use of the Testimony of Key Prosecution Witnesses After It Was Known That Their Prior Statements to the FBI Were Unavailable Violated Due Process.

By the time the Commonwealth put the two key witnesses on the stand to testify against petitioner, the prosecution knew (1) such witnesses had given detailed statements to the FBI which were apparently inconsistent with the tes-

timony now to be offered, and (2) petitioner would have no way to meet such damaging testimony since the trial judge had ruled erroneously that he would not issue a subpoena having assumed the FBI would assert a supposed federal privilege. Obviously, this placed petitioner at a disadvantage and denied him a fair trial as much as other actions of a state prosecutor, even though not wilful or wrongful, which deny the defendant access to relevant statements. *Cf. Brady v. Maryland*, 373 U. S. 83. The first published version of the opinion of the court below appeared to recognize the unfairness (Appendix A, pp. 23-24, *infra*) but the amended version deleted the language.

A recent decision of the Supreme Court of California, *People v. Parham*, decided September 12, 1963, 32 U. S. Law Week 2137, dramatizes the importance and increasingly recurrent nature of this constitutional issue raised by petitioner, that of fair trial. In *Parham*, the trial judge, upon being informed that the FBI would not grant access to certain prior statements of prosecution witnesses, declared, nevertheless, that a subpoena *duces tecum* must issue. However, when the FBI appeared pursuant to a properly issued subpoena and declined to produce the statements, the trial court denied a defense motion to strike the testimony of prosecution witnesses whose statements had not been produced. The Supreme Court of California affirmed. In doing so it committed the same error of constitutional law as made by the Pennsylvania court below. It is vital, therefore, that this Court grant certiorari to settle this increasingly significant problem in state-federal relationships. It is similar to other issues now before this Court. See, *e.g.*, *Murphy v. N. Y. Harbor Waterfront Comm'n*, Oct. Term, 1963, No. 138.

In our increasingly complex and interrelated federal society the cooperation of state and federal officers has become an important phenomenon. The dangers to the accused inherent in this overlap are magnified when state courts, such as the one below, abdicate their judicial function in deference to a mere statement by an FBI agent as

to the complete and absolute privilege surrounding FBI statements. The rights of the individual have too often been threatened in the name of "national security."

The final version of the opinion of the Supreme Court of Pennsylvania appears to imply that the "unfairness" which troubled this Court in *Jencks* inhered in the governmental act of denying access to the documents sought. However, if the FBI, as was claimed, had a privilege to refuse to disclose the documents sought in the present case, to do so was "fair" on its part. The unfairness in this case as in *Jencks*, therefore, actually resulted from the use of the testimony of witnesses to convict petitioner without his having the benefit of impeaching those witnesses on the basis of specific known statements which were withheld.

CONCLUSION.

For the reasons stated above, this Court should grant the Petition and issue a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

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October 17, 1963.

APPENDIX A.

MAJORITY OPINION OF PENNSYLVANIA SUPREME COURT:

Commonwealth *v.* Smith, Appellant.

Argued September 27, 1962. Before MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and KEIM, JJ.

Appeal, No. 404, Jan. T., 1962, from order of Superior Court, Oct. T., 1962, No. 75, affirming judgment of Court of Quarter Sessions of Chester County, June T., 1960, No. 210-A, in case of Commonwealth of Pennsylvania v. E. Newbold Smith. Order affirmed; reargument refused August 7, 1963.

Same case in Superior Court: 198 Pa. Super. Ct. 499.

Indictments charging defendant with obstructing officer in the execution of process, assault and battery and aggravated assault and battery. Before LICHTENFELD, J.

Verdict of guilty of assault and battery and judgment of sentence entered thereon. Defendant appealed to Superior Court which affirmed judgment, opinion by WATKINS, J. Appeal to Supreme Court allowed.

John B. Hannum, with him *Theodore O. Rogers*, and *Pepper, Hamilton & Scheetz*, for appellant.

Samuel J. Halpren, District Attorney, for Commonwealth, appellee.

OPINION BY MR. JUSTICE COHEN, July 2, 1963:

This is an appeal from a conviction of simple assault and battery arising out of a fight between appellant and a police officer on a public highway. At appellant's trial, each of the men maintained that the other was the instigator of the altercation. On this key factual issue, two women who were driving on the highway corroborated the police officer's testimony. At this point in the trial, appellant's counsel requested the trial judge to issue a subpoena duces tecum to compel the F. B. I. to turn over statements given to it by the two women.[1] Upon being questioned as to the purpose of this production, counsel replied that the statements given to the F. B. I. did not include "any observation of who struck the first blow" and thus could be used to impeach the testimony of the two women. The trial judge refused to issue the subpoena after being informed by a representative of the F. B. I. that the Bureau would not produce the reports because they contained confidential information, the disclosure of which would threaten the security of the Justice Department.

The jury decided the factual question of who instigated the fight adversely to appellant and the Superior Court affirmed the conviction. We granted allocatur because of appellant's claim that the refusal to issue the subpoena deprived him of due process of law contrary to the decision of the United States Supreme Court in *Jencks v. United States*, 353 U. S. 657 (1957). After considering appellant's arguments, we find that the *Jencks* doctrine is inapplicable to the instant case.

In *Jencks*, the United States Supreme Court held that a conviction could not stand where defense counsel was denied access for impeachment purposes to certain F. B. I. reports. In setting forth the rationale for its decision, the Court stated: "[S]ince the Government which prosecutes

1. The statements had been secured by the F. B. I. during its investigation of appellant's claim that the arresting officers had violated his civil rights.

an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . ." (355 U. S. at 671). With regard to the problem of disclosing secret information, the Court concluded that the federal government must either reveal the information or abandon the prosecution. Appellant asserts that the *Jencks* decision controls this case.[2]

Although we are in complete agreement with the salutary principle of the *Jencks* doctrine, we find that it has no application to the instant case.

[The paragraph immediately above did not appear in the version originally issued. Following the denial of defendant's petition for reargument, the Supreme Court of Pennsylvania amended its majority opinion to delete the following paragraph and replace it with the version immediately above:

> **"We are in complete agreement with the salutary principle of the Jencks case that it is unfair for the prosecution to use a witness against the defendant and then deny access to prior statements of the witness for purposes of impeachment. See State v. Pacheco, 38 N. J. 120, 183 A. 2d 54, 57 (1962); cf. Brady v. Mary-**

2. In *Palermo v. United States*, 360 U. S. 343, 345 (1959), the Supreme Court explained that the *Jencks* decision was based on the Court's power "to prescribe procedures for the administration of justice in the federal courts", and hence was not necessarily one of constitutional dimension. The Court in *Palermo* held that the subsequent Act of Congress (18 U. S. C. § 3500) and not *Jencks* now governed federal prosecutions. In other instances, however, it has been held that the suppression of evidence by the prosecution violates due process of law. See *Brady v. Maryland*, 31 U. S. L. Week 4435 (May 13, 1963); *United States ex rel. Almeida v. Baldi*, 195 F. 2d 815 (3d Cir. 1952), cert. denied, 345 U. S. 904 (1953). Since we hold that the *Jencks* rationale is inapplicable to the instant case, we need not concern ourselves with the correctness of appellant's contention that this case is one of constitutional dimension and hence "controlled" by *Jencks*.

land, 31 U. S. L. Week 4435 (May 13, 1963); DiJoseph Petition, 394 Pa. 19, 145 A. 2d 187 (1958). As we have often observed, the purpose of criminal prosecutions is to achieve justice and not merely to obtain convictions. The Jencks doctrine, however, has no application to the instant case."]

In the first place, it was the F. B. I. and not the Commonwealth which denied appellant access to the information in question. Ironically, the F. B. I. entered this case and made its investigation during which the statements were secured solely because of appellant's claim that the arresting officers had violated his civil rights. The Commonwealth is no more to blame for the unavailability of the F. B. I. reports than if a witness beyond the reach of process refused to voluntarily appear and testify on behalf of appellant. Consequently, the unfairness which troubled the *Jencks* court is not present here.

In addition, we fail to perceive how the defense was harmed by the nonproduction of the F. B. I. reports. The two witnesses gave a statement to the district attorney which also did not include an observation as to who struck the first blow. This statement was given to appellant. Therefore, even if reports of the state police were involved, the offer of proof would not justify the disclosure of confidential information.[3] *cf. Rosenberg v. United States*, 360 U. S. 367 (1959).

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3. When we are confronted with a subpoena for the production of important impeaching statements in the possession of the Commonwealth, we will then be forced to decide the following difficult questions with which other jurisdictions have struggled: what foundation defendant must establish as to the existence and relevancy of the alleged statements; what role the courts should play in determining the Commonwealth's claim that the statements either are not relevant or contain privileged information; what penalty should be invoked for noncompliance by the Commonwealth. See *People v. Wolff*, 19 Ill. 2d 318, 167 N. E. 2d 197, 199-202 (1960).

It is true that certain remarks made by the plurality opinion in *Schlesinger Appeal*, 404 Pa. 584, 172 A. 2d 835 (1961), lend support to the position taken by appellant. These observations which were based on a misapplication of the *Jencks* case were unnecessary to the result in *Schlesinger* and, to the extent that they are inconsistent with our holding here, they are expressly disapproved.

Order affirmed.

Mr. Chief Justice BELL disqualified himself because his daughter-in-law was a character witness.

APPENDIX B.

DISSENTING OPINION BY MR. JUSTICE O'BRIEN:

I cannot agree with the conclusion reached by the majority nor with the off hand manner in which it treats and disapproves "certain remarks" in the opinion of Mr. Chief Justice CHARLES ALVIN JONES in *Schlesinger Appeal*, 404 Pa. 584, 172 A. 2d 835 (1961).

In *Schlesinger*, a proceeding instituted to disbar an attorney, this court considered the application of *Jencks v. United States*, 353 U. S. 657, to state actions; we there held: "The Subcommittee denied the appellant's request that it issue a subpoena directed to the F. B. I. to produce the recordings made by the F. B. I. of the meetings at 440 Wood Street, Pittsburgh, as to the making whereof the Committee's witness Dietze had testified. This evidence was proffered to contradict the statements of Dietze, Mazzei and Cvetic, and to show that appellant had never attended or participated in any meetings on the premises described. The Subcommittee also denied the appellant's similar request that it issue a subpoena directed to the F. B. I. to produce the reports which the Committee's witnesses Dietze, Mazzei and Cvetic testified that they had submitted to the F. B. I. covering the matters to which they had testified at the hearing. This proposed evidence was for the purpose of contradicting statements made by these witnesses at the hearing. The appellant was entitled to the requested evidence in both particulars on the basis of the decision of the Supreme Court in Jencks v. United States, 353 U. S. 657 (1957).

"In disposing of the exceptions to the report and recommendation of the Subcommittee the court en banc held the Jencks case to be inapplicable on the ground that it was 'a criminal prosecution and relates to the procedural requirements for Federal prosecution of crime by providing

for requirement of fair procedure for the defendant.' The distinction is without merit. In the Jencks case the defendant was charged with perjury for falsely swearing in a non-Communist affidavit which he filed with the National Labor Relations Board. The principal witnesses against him were two informers, Ford and Matusow, hired by the F. B. I. They testified that they had sent reports to the F. B. I. concerning matters to which they were testifying at the trial. The trial court refused the defendant's motion to direct the F. B. I. to produce these reports for inspection. The Supreme Court reversed the defendant's conviction, declaring (pp. 668-669) that 'the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial . . . Justice requires no less.' The Supreme Court further held (page 666) that '*the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony.*'

The present appellant is just as much entitled to fair procedure as was the defendant in the Jencks case. A disbarment proceeding is every bit as serious as a criminal trial and often far more so; the penalty of disbarment is certainly harsher than a fine or short imprisonment. *Nor is the rule of the Jencks case peculiar to federal criminal prosecutions; it is a requirement of due process of law.* The appellant has a *constitutional right* to the production of the reports of the witnesses against him, touching the events and activities to which they testified, and to inspect so much of such reports as is relevant to the issue. Justice required no less in the Jencks case, and it requires no less in the instant case." (Emphasis supplied.)

I believe the above quoted language of *Schlesinger* to be a correct statement of the law and that the Jencks deci-

sion applies to the instant case. The majority distinguishes the situation by absolving th Commonwealth of any attempt to deny appellant access to the reports in question. The same circumstances existed in *Schlesinger*, where we reached a conclusion contrary to that now reached by the majority.

I further take issue with the majority's conclusion that appellant's rights were not prejudiced inasmuch as similar statements, given to the district attorney, were made available to the defense. The rule requiring the turning over of statements touching on the testimony of a witness does not require the laying of a foundation of inconsistency; all that is required is a showing that a report was made, touching upon the matter testified to at trial. The fact that similar statements were made available to the defense should not deprive appellant of his right to the statements in question.

The majority cites *Rosenberg v. United States*, 360 U. S. 367, in connection with the proposition that appellant's rights were not trespassed upon, since he had the district attorney's statements. In that case, the United States Supreme Court held that a denial of a request for a document was harmless error, because the defense already had the information. The harmless error referred to was the refusal of the trial court to order the government to turn over to the defense a letter written to the F. B. I. by the witness. The letter indicated that the witness did not trust her memory of the events to which she would testify and she would have to refresh her recollection by rereading her original statement made some three years earlier. The court held that in this instance the *very same* information as contained in the letter, which should have been turned over, was within the knowledge of the defense and hence, refusal of production of the letter, while error, was harmless. The situation here is different. Here there is a report which might contain things other than contained in the District Attorney's reports referred to by the majority. In *Rosenberg*, there is no question that only one piece of information

is involved in the letter and the defense had that information. The entire holding of the court on the question is contained in the final paragraph of the *Rosenberg* opinion as follows: "*An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the fense is entitled.* However, when the *very same* information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of justice to order a new trial." (Emphasis supplied.)

Finally, I fail to perceive how we are now faced with any problem which might arise from a refusal of the F. B. I. to turn over the reports, after issuance of a subpoena directing it to do so. The record indicates that the defense made three applications for subpoena duces tecum. 1.) A subpoena was issued without leave of court, in violation of the local rules, and was properly quashed. 2.) An application was made to the court for a subpoena before any witnesses had testified. At that time, the F. B. I. representative was in court in response to the subpoena issued without leave of court. He testified that the material sought was confidential and the trial judge refused the application for subpoena and quashed the subpoena previously issued. 3.) Defendant applied to the court for a subpoena after the witnesses had testified. This application was also refused and forms the basis of the dispute.

Defendant was clearly not entitled to a subpoena without leave of court and the one which was issued was properly quashed, irrespective of the position of the F. B. I. with regard to the confidential nature of the records. Under the holding in *Jencks v. United States*, supra, or in accordance with the statute which followed that decision, 18 U. S. C. 3500, defendant was not entitled to a subpoena before witnesses against him, who had given statements to the F. B. I., had testified. The application for subpoena

made at the beginning of the trial was, therefore, properly refused, again irrespective of the position of the F. B. I. on the confidential nature of the documents. It was only after the witnesses testified that defendant had a right to a subpoena and at that time his request was denied.

We cannot say with certainty that, had appellant been granted a subpoena when he applied for it at the proper time, the Justice Department would have refused to honor it. I believe that due process required the issuance of the subpoena, without regard to speculation as to its reception by the F. B. I.

Accordingly, I dissent and would grant a new trial to appellant.

APPENDIX C.

APPLICABLE EXCERPTS FROM OPINION OF TRIAL COURT:

The third additional reason for a new trial alleging that the Court erred in quashing the subpoena duces tecum directed to the agent in charge of the Philadelphia office of the Federal Bureau of Investigation to produce certain records, and photographs taken in connection with their investigation of this incident and in the disallowance of the subsequent petition for subpoena duces tecum, as well as the related fifteenth additional reason for a new trial cannot be sustained.

The Rules of this Court provide that "no subpoena duces tecum for a public record or paper shall be issued without the special order of the Judge." It is admitted by the defendant that there was no request for the issuance of a subpoena duces tecum. After the Trial Judge quashed the subpoena upon motion of the Assistant United States Attorney, the defendant filed a petition for subpoena duces tecum "on the special agent in charge of the Federal Bureau of Investigation of Philadelphia requiring him to produce at petitioner's trial the records of an investigation into the facts and circumstances surrounding certain events of the night of August 8, 1960." The petitioner further averred that he believes the report contained "signed statements of Yvonne Cochrane and Betty Sweet, alleged eye witnesses to some of said events of August 8, 1960, who have categorically refused to discuss what they saw, with your petitioner or his representatives although they have freely given statements to the prosecutors herein."

There are several reasons why the petition was properly refused.

Pursuant to authority vested in the Attorney General of the United States, by R. S. 161 (U. S. Code Title 5, sec-

tion 22), it was ordered (Order No. 3229 and Order No. 3229 supplement No. 2) that all official files, documents, records and information in the office, inter alia, of the Federal Bureau of Investigation, are to be regarded as confidential. The order further provided that "no officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General acting for him."

The special agent and an Assistant United States Attorney appeared, as required under Order 3229 supplement No. 2, in response to the subpoena duces tecum which had issued without Court Order. The Assistant United States Attorney asked that the subpoena duces tecum be quashed on the grounds that the person served was the improper person to be served, and further that it was a violation of the security of the office of the Department of Justice.

The record disclosed that the Attorney General has not waived the confidential nature of the files. The executive officer has the right to determine whether production and publication of the document in his custody would be injurious to the public service. Therefore, the disclosure of the information contained in the files of the Federal Bureau of Investigation, which are not in the true sense public records, cannot be compelled by this Court, when the public official in charge of such information states it is confidential in nature. See Marks's Appeal, 121 Pa. Superior Ct. 181.

Further, the defendant's petition for the subpoena duces tecum does not disclose that the report contained any matters which would be material and relevant to his defense. The Supreme Court in American Car and Foundry Co. v. Alexandria Water Co., 221 Pa. 529, 535, quoted 23 Am. and Eng. Ency. of Law (2d Ed.), page 179, that an application for production and inspection will not be

granted where it is merely for the purpose of a fishing expedition, as where it is made to discover whether or not there is evidence contained in the documents which will be useful to the applicant, or for the purpose of determining whether he has a cause of action, or a defense, or in anticipation of a defense, or to gratify curiosity. The petition contains nothing that would show the materiality of the file except that it contained material involving the same incident.

Later, during the course of the trial, the defendant renewed his application for a subpoena duces tecum on the grounds of a discrepancy between the statement given to the Federal Bureau of Investigation and that in the possession of the District Attorney. When asked by the Court the nature of the discrepancy, it was alleged to be in the statement of Miss Elizabeth Sweet, "and it is my belief that her testimony or her statement to the F. B. I. does not include any observation of who struck the first blow, whereas today she states that Mr. Smith did." The record discloses that Sweet was cross-examined by the defendant as to the alleged discrepancy in her statement in the hands of the District Attorney which did not contain a statement as to who struck the first blow and her testimony in Court as to her observation as to who struck the first blow. The credibility of the witness on this point was already before the jury. Even if we assume that the defendant had knowledge that the statement by the Commonwealth's witness to the Federal Bureau of Investigation does not include any observation of who struck the first blow, it in effect would be the same as the statement in the hands of the District Attorney. Commonwealth's witness, Sweet, gave her explanation of the so-called discrepancy, and it became a question for the jury to determine her credibility. Thus her credibility on this same subject was already before the jury for determination. A reading of the record does not indicate that a reference in the District Attorney's statement as to what she heard was inconsistent with what she saw, which

was omitted from the statement. See Com. v. Craven, 138 Pa. Superior Ct. 436, 444. However, that the defendant had no knowledge of the contents of the statement made to the Federal Bureau of Investigation is not only evident because the files were confidential, and there was no showing that there was a waiver of their confidential nature, but the lack of knowledge of the contents of the statement by the defendant was emphasized when counsel for the defendant stated to the Court that if defendant "could use it, this would be in corroboration of her testimony or attack her credibility." In this regard it should be borne in mind that as a general rule, declarations made by a witness at another time, though admissible to contradict him, are not competent to confirm or corroborate his present testimony. 1 Henry, Penna. Evidence, page 24, section 12. An exception to this general rule is a prior declaration of a witness whose testimony has been attacked and whose credibility stands impeached, and not merely contradicted by conflicting testimony, and by reason of said impeachment, is admissible to support the credibility of the witness. To sustain the admission of such declaration, the impeachment must plainly appear, and must go to the credibility of the witness. Lyke v. Lehigh Valley Railroad Co., 236 Pa. 38. Further, the admissibility of a consonant statement is discretionary with the Court, and depends largely upon the character and degree of impeachment. Com. v. White, 340 Pa. 139; Com. v. Trignani, 185 Pa. Superior Ct. 332, affirmed 393 Pa. 140.

It is a well established rule that the Commonwealth is under no obligation to place the secret files of police investigators at the disposal of defendant. Commonwealth v. Friday, 171 Pa. Superior Ct. 397. That case involved the files of the State Police, but there is no difference in principle that the files here demanded are of a federal agency. In the Friday case as in this one, the purpose of requesting the statements was to attack the credibility of the Commonwealth's witnesses. The Court there held that there was no duty resting upon the State Police to produce

the statements. Nor is there such a duty upon the Federal Bureau of Investigation.

It is also questionable under the Friday case, whether the subpoena duces tecum should not have been directed to the executive head of the Federal Bureau of Investigation, who is the legal custodian of the records, rather than to the special agent in charge of the Federal Bureau of Investigation at Philadelphia.

APPENDIX D.

DEPARTMENT OF JUSTICE, ORDER NO. 3229.

DEPARTMENT OF JUSTICE.

Office of the Attorney General.

[Order 3229]

DISCLOSURE OR USE OF CONFIDENTIAL RECORDS AND INFORMATION

May 2, 1939.

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, section 22), *It is hereby ordered:*

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY,
The Attorney General.

[F. R. Doc. 46-7422: Filed, May 2, 1946; 2:30 P. M.]

DEPARTMENT OF JUSTICE, ORDER NO. 3229, SUPPLEMENT NO. 2.

"Department of Justice
Washington 25, D. C.

June 6, 1947

Order No. 3229
Supplement No. 2

To All United States Attorneys:

(154)

Procedure To Be Followed Upon Receiving
A Subpoena Duces Tecum

Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort

(155)

which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the certified

copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which the Department's own files would cause great inconvenience, are acceptable in response to a subpoena.

(156)

If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

Tom C. Clark,
Attorney General."

APPENDIX E.

DECREES OF WHICH REVIEW IS SOUGHT:

ORDERS OF TRIAL COURT:

1. ORDER.

AND Now, this first day of December, 1961, the defendant's Motion for New Trial is overruled and a new trial is denied. Further, the defendant's Motion in Arrest of Judgment is denied. The Commonwealth has leave to move for sentence.

By THE COURT:
SAMUEL LICHTENFELD, *J.*

2. JUDGMENT OF SENTENCE.

12-22-61—Defendant appears for sentence. Sentence of the Court. Pay fine $1,000.00 and cost of pros. Suffer further punishment by serving 30 days in Chester County Prison from this date. Stand committed until this sentence is complied with or you are otherwise discharged according to law.

By THE COURT:
SAMUEL LICHTENFELD, *J.*

ORDER OF SUPERIOR COURT OF PENNSYLVANIA:

"Judgment Affirmed." (June 13, 1962)

ORDERS OF SUPREME COURT OF PENNSYLVANIA:

1. "Order affirmed." (July 2, 1963)
2. "Petition [for Reargument] denied. Per Curiam." (August 7, 1963)

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 561

E. NEWBOLD SMITH,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, GREATER PHILADELPHIA BRANCH AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

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In The

Supreme Court of the United States

October Term, 1963

No.

E. Newbold Smith,

Petitioner,

v.

Commonwealth of Pennsylvania,

Respondent.

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, GREATER PHILADELPHIA BRANCH AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF THE PETITION FOR CERTIORARI

Interest of the *Amici*

This brief is submitted with the consent of petitioner and respondent. The American Civil Liberties Union, Greater Philadelphia Branch, participated in an earlier stage of this case by submitting a petition for leave to file a brief and present oral argument on petitioner's motion for reargument of this case in the Supreme Court of Pennsylvania. The interest of *amici* in this case relates to their regular concern that persons accused of crime receive a fair trial of all the issues involved. Because evidence in the possession of the United States was wrongfully withheld after demand was properly made for its disclosure, we believe petitioner was denied a fair trial and, therefore, due process of law.

Reasons for Granting the Writ

1. During the course of petitioner's trial he made a timely request in proper form under state law for the issuance of a subpoena *duces tecum* to obtain material, directly relevant to his defense, which was in the possession of the

Federal Bureau of Investigation. The trial court refused to issue the subpoena, thus making the relevant material unavailable to petitioner. This refusal and petitioner's conviction have been affirmed by the Supreme Court of Pennsylvania.

In his petition for a writ of certiorari petitioner argues that the State thus violated a constitutional obligation under the Fourteenth Amendment to make its process reasonably available to a defendant in a criminal prosecution seeking material to enable him to establish his defense at trial. We support petitioner's contention that no sufficient reason existed for the refusal of the state courts to issue the subpoena in this case and, therefore, fully support petitioner's argument that the effect of the judgment below was unconstitutionally to deprive petitioner of his liberty. The petition for a writ of certiorari should be granted to correct this deprivation of important constitutional rights.

2. However, the Court may dispose of the present case without reaching the broad constitutional question of the extent to which state courts must afford criminal defendants compulsory process in aid of their defense, because in this case denial of the subpoena was based in the first instance upon a misapprehension of federal law. There is every indication that, but for this misapprehension, the subpoena would have been granted by the state courts in due course of Pennsylvania law.

The decisions below rest upon an assumption that the United States, through its local United State Attorney, has properly asserted a privilege in this case not to make the desired material in its possession available to the petitioner.* This assumption that a federal privilege has been

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* The trial judge's assumption that a federal privilege had been claimed appears clearly in his opinion denying petitioner's motion for a new trial (R. 377a). The Supreme Court of Pennsylvania stated in its opinion that "it was the F.B.I. and not the Commonwealth which denied appellant access to the information in question." 412 Pa. 1, 4.

claimed is erroneous. Under the Department of Justice Regulation applicable at the time of petitioner's trial,* as construed in *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, only the Attorney General of the United States may decide whether or not to claim a federal privilege not to produce material in the possession of the Department of Justice in response to a state subpoena. The record does not show that the Attorney General has made such a decision in this case. The local United States Attorney, upon whose statement the courts below rested their conclusion that a federal privilege had been raised, had no independent authority either to claim or to waive federal privilege. The federal agent in possession of documents, although immune from state-court contempt under the *Touhy* decision where his refusal to produce is pursuant to a valid departmental "house-keeping" regulation, has no authority under that case to decide affirmatively to claim federal privilege. The rule that the privilege may only be claimed by a decision of the Attorney General is incorporated in the present Regulation of the Department of Justice, which was promulgated shortly after petitioner's trial (28 C. F. R. Part 16, 27 Fed. Reg. 774, January 16, 1962). It states that, under the *Touhy* decision, when a request for material in the Department's possession is made, the local United States Attorney is only to request time "within which to refer the subpoena or order to the Attorney General" and is to refuse to produce requested material only "until instructions from the Attorney General have been received."

Thus the assumption by the courts below that a Federal privilege had been claimed here was erroneous and the decisions denying petitioner a subpoena flowed directly from

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* Department of Justice Order No. 3229, May 2, 1946, 11 Fed. Reg. 4920, as supplemented by Supplement 2 to that Order, dated June 6, 1947. The Order and the Supplement are reproduced in Appendix D to petitioner's brief and in footnote 1 to the Court's opinion in *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462, 463-464.

that error. Federal law contemplated that the state trial court would issue the subpoena in this case thus calling upon the Attorney General to decide whether or not to invoke privilege. By erroneously assuming that a privilege had already been claimed, the state courts below denied the subpoena, and the Attorney General was never called upon to decide—and never did decide—whether or not to claim privilege. Although the courts below might have refused to issue a subpoena in this case even had they correctly concluded that the United States had claimed no privilege, in all probability the requested subpoena would in fact have issued. The state Supreme Court's opinion gives no reason, other than the supposed claim of federal privilege, for refusing the subpoena. The opinion further states the Court's adherence, as a matter of state law, to the rule of *Jencks* v. *United States*, 353 U. S. 657, showing that the state court would have ordered production in this case had the material been in possession of the state government, questions of federal privilege thereby being absent. 412 Pa. 1, 4. In addition, had the state subpoena issued, in all probability no federal privilege would have been claimed by the Attorney General. On the facts of this case, it does not seem possible that the interests of the federal government could have been affected adversely by the disclosure of the content of interviews with two private eye-witnesses to a roadside incident which did not in any way involve the federal government or its agents. In these circumstances, a claim of privilege by the federal government would be of very questionable validity, an issue left open in the *Touhy* decision.

Conclusion

We respectfully submit that it would be appropriate to dispose of this petition by vacating the decisions below in light of their erroneous conclusions that a federal privilege has been claimed in this case and by remanding the question

of the availability of state process in light of the facts (1) that a federal privilege had not been authoritatively claimed, and (2) that federal law contemplates a procedure under which the state should issue its subpoena before an authoritative claim of federal privilege will be made.

Respectfully submitted,

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November, 1963.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 561

E. NEWBOLD SMITH, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES

This memorandum is being filed in response to the Court's invitation to the Solicitor General to file an expression of the government's views in this case.

STATEMENT

The relevant facts, insofar as the government's interest is concerned, are as follows:

On January 11, 1961, the Special Agent in Charge of the Philadelphia Office of the Federal Bureau of Investigation was served with what purported to be

a subpoena duces tecum issued by the Court of Quarter Sessions in and for the County of Chester, Pennsylvania [1] (R. 48-49) commanding him to appear at 10 a.m. on January 16 at a session to be held at West Chester, to testify in the case of *Commonwealth of Pennsylvania* v. *E. Newbold Smith*, Nos. 210, 210A, 211, 211A, and 211B, June Term, 1960 (a criminal prosecution for, *inter alia*, assault and battery; see *infra*), and to bring with him—

> Statements of all witnesses, diagrams, sketches and photographs taken in connection with investigation of incidents on Monday, August 8, 1960, at or about 9:00 P.M. and continuing thereafter in Thornbury Township and in the Borough of West Chester, Chester County, Pennsylvania, when peace officer Frank H. Elliott of Thornbury Township and police officers Harry Saltzman and Gordon W. Smith together with certain other West Chester Borough officers willfully subjected E. Newbold Smith of Warren Avenue, Paoli, Pennsylvania, to the deprivation of his rights, privileges and immunities secured and protected by the Constitution and the laws of the United States in violation of Title 18 U.S.C. Section 242. * * *

The investigation referred to in the subpoena, as appears from the Department file in this matter, had been undertaken by the F.B.I. at the request of the Civil Rights Division of the Department on a com-

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[1] As we point out below, the court subsequently held the subpoena invalid for failure to comply with a local rule prohibiting the issuance of a subpoena duces tecum for a public record or paper without the special order of a judge.

plaint filed by the defendant in the Pennsylvania case. It concerned an asserted deprivation of Smith's civil rights by officers of the West Chester Police Department, at the West Chester police station, on the night of August 8, 1960, following a roadside incident in which Smith had allegedly assaulted Frank Elliott, the chief of police of Thornbury Township. The affray, in which Smith was also injured, had resulted from the officer's stopping of Smith's car for a traffic violation. The F.B.I. investigative file in the matter was and is voluminous.

The Pennsylvania proceeding was a criminal prosecution of Smith for assault and battery upon officer Elliott in the roadside altercation, and for certain related offenses, including alleged acts of assault upon other officers later at the police station (R. 2, 43-44; Pet. 4). At the time of the service of the subpoena no federal prosecutive action had been initiated.[2]

On January 16, 1961, the date set for Smith's trial on the State charges, the agent to whom the subpoena was addressed appeared before the Chester County court accompanied by James Kelley, an Assistant

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[2] Two months later, on March 22, 1961, a federal indictment was returned in the Eastern District of Pennsylvania charging officer Elliott and two West Chester police officers with having willfully deprived Smith of his constitutional rights, in violation of 18 U.S.C. 242, by striking and kicking him at the police station with intent to inflict summary punishment on him. The federal indictment is still pending. The failure to schedule the case for trial has been occasioned by the fact that a key government witness to the events at the police station was subsequently involved in an accident; his injuries have substantially impaired his capacity to testify.

United States Attorney on the staff of the United States Attorney for the Eastern District of Pennsylvania (R. 53, 57-58). Mr. Kelley moved to quash the subpoena on the grounds (1) that the officer to whom it was directed was not the proper person on whom to effect service and (2) that the records called for pertained to a confidential investigation undertaken by the Department of Justice (R. 58). In an ensuing colloquy, counsel for Smith advised the court that the subpoena had been issued at the instance of the defense and that, in counsel's view, the subpoena was "in order" (R. 58-59). The court at this point asked defense counsel, "How about the rules of court which provide that no subpoena duces tecum [for a public record or paper] shall be issued without a special order of the judge[?]" (R. 59).[3] Counsel told the court that he had not been aware of this rule. The court thereupon made the following ruling (*ibid.*):

> Not limiting myself to the rule, that I have just mentioned, the rule of court, I am going to allow the motion to quash.

A jury was then empaneled to try the State charges and an adjournment was taken to the following day (R. 60).

On the next day, January 17, Smith filed a petition formally requesting the court to issue a subpoena duces tecum for the F.B.I.'s investigative file (R. 53-

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[3] The court rule referred to by the judge states: "No subpoena duces tecum for a public record or paper shall be issued without the special order of the Judge" (R. 54, 410; Pet. App. C, p. 31).

56). The petition recited the service of the earlier invalid subpoena, the appearance of the F.B.I. official in response thereto the Assistant United States Attorney's motion to quash, and the court's ruling (R. 53-54). Paragraph 4 of the petition stated (*ibid.*):

> 4. That your petitioner believes and therefore avers that included in said report are signed statements of Yvonne Cochrane and Betty Sweet, alleged eyewitnesses to some of said events of August 8, 1960, who have categorically refused to discuss what they saw with your petitioner or his representatives, although they have freely given statements to the prosecutors herein.

The petition concluded with an averment that it was important to Smith's defense to have the F.B.I. records and reports available at his trial (R. 54). Notice of the petition was not given to any federal official, and none was present at the hearing.

The court denied the petition, stating that "the only reason for the denial is that the information sought for in paragraph four of the petition is being made available to the defendant by the District Attorney" (R. 61). The "information" which the court said was being made available to the defense by the District Attorney (*i.e.*, the Commonwealth's Attorney) consisted of statements made by the two named women to the local police on the evening of August 9, 1960, the day following the roadside episode which gave rise to the State charges (R. 123-127, 130-131, 139-141; Pet. 6).[4]

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[4] The Department file reflects that the Commonwealth's Attorney asked the United States Attorney for copies of the

Miss Sweet and Mrs. Cochrane each testified to having witnessed the encounter between Smith and officer Elliott—from a car operated by Mrs. Cochrane in which Miss Sweet was a passenger—and each said that it was Smith who struck the first blow (R. 118-120, 125, 127-129). Their testimony in this regard was consistent with Elliot's (R. 63-64) but was subsequently contradicted by Smith (R. 246-247). As Miss Sweet and Mrs. Cochrane completed their direct testimony, the prosecution delivered to the defense counsel, for purposes of cross-examination, the witnesses' statements to the local authorities on the evening following the altercation, and counsel used the statements in efforts to impeach their testimony (R. 123-124, 125-127, 130-131, 139). To that end, he brought out that in her pre-trial statement, Miss Sweet had said that when she heard "Yvonne Corcoran [*sic*] exclaim that Officer is being attacked, * * * I then turned and looked toward the officer" (R. 126). Asked by counsel why she had made this statement if in fact she had seen the beginning of the physical exchange, as she had testified, the witness replied that she did not know (R. 126-127).

Following the completion of Miss Sweet's testimony, and after Mrs. Cochrane had testified on direct but

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F.B.I. reports in this matter prior to the State trial, but that the United States Attorney was instructed by the Department to advise the attorne, that the reports could not be made available outside the Department because they related to a matter concerning which the Department had not taken final action. The United States Attorney thereafter so advised the State prosecutor (R. 132).

before her cross-examination, defense counsel renewed his application for a subpoena duces tecum requiring the production of the F.B.I. "[f]ile" in this matter, "particularly with reference to the statement[s] given by these ladies." Counsel referred to "a discrepancy" which he believed existed between Miss Sweet's testimony and her statement to the F.B.I., in that her statement to the F.B.I. "does not include any observation of who struck the first blow whereas today she states that Mr. Smith did" (R. 131). These representations were, of course, based upon assumptions that the two women had given statements to the F.B.I. and that Miss Sweet's was inconsistent with her trial testimony to the extent indicated.[5] The court denied the motion, stating that it would not reconsider its previous ruling (R. 132).

Smith was convicted of the charge of assault upon officer Elliott and acquitted of the remaining charges (R. 352; Pet. 7). A motion for a new trial, based in part on the court's refusal to issue a subpoena duces tecum for the F.B.I.'s files and records, was denied with opinion (Pet. App. C., pp. 31-35; Pet. App. E, p. 39), and Smith was sentenced to 30 days' imprisonment and to pay a fine of $1,000 and the costs of the prosecution (R. 417; Pet. App. E, p. 39). On appeal, the Superior Court of Pennsylvania affirmed the conviction (198 Pa. Super. 499). The judgment of the latter court was in turn affirmed by the Supreme Court of Pennsylvania, one judge dissenting (Pet. App. A and B, pp. 21-30).

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[5] In fact, Miss Sweet and Mrs. Cochrane made signed statements to the F.B.I. on September 21, 1960.

DISCUSSION

The petition for certiorari and the brief *amici curiae* have been confused by two misconceptions as to the conduct of federal officials.[6] The facts are that—

(1) Neither the Department of Justice nor its local representatives ever refused a specific request for statements given by witnesses who had testified or were definitely scheduled to testify against the defendant in the criminal prosecution.

(2) The Assistant United States Attorney was acting with the authority and upon the instructions of the Department of Justice.

The significance of these facts is apparent from the sequence of events. The subpoena served on the Philadelphia special agent in charge in this case, which the State court quashed under the circumstances we have related, called for the production of "[s]tatements of *all* witnesses, diagrams, sketches and photographs taken in connection with [the F.B.I.'s investigation of the incidents in question]" (*supra*, p. 2; emphasis added). There was no request for, or reference to, any specific document or paper in the file. Neither of the two women (Mrs. Cochrane and Miss Sweet) whose names figured in the subsequent discussions and events (after the federal government's connection with the case had terminated) was mentioned. The subpoena was simply a broad-based de-

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[6] The first of these misconceptions was apparently shared by the court below. Pet. App. A, p. 22.

mand for virtually the entire contents of an F.B.I. file on a matter which the Department had currently under investigation.

It was for this reason that the Department resisted the subpoena as violative of the confidentiality of executive records in a matter still in live status. For the same reason, we believe that the State court's order of January 16, 1961, granting Assistant United States Attorney Kelley's motion to quash the subpoena (*supra*, pp. 3-4), was correct—wholly apart from the additional and independent ground on which the court declared the subpoena invalid, *viz.*, counsel's failure to comply with the local rule of court prohibiting the issuance of a subpoena duces tecum for a public record or paper without the special order of a judge.

Contrary to the assumption of the *amici curiae* (Br. 2-4; cf. Pet. 9), the Assistant United States Attorney who represented the special agent in the proceedings on the subpoena was not acting on his own authority and responsibility in claiming privilege as to the contents of the F.B.I. file. The Department file shows that the United States Attorney had consulted the Department concerning the subpoena and had been advised by the Department that the special agent should decline to produce the documents called for. The *amici* are also mistaken (see Br. 3)—as are the petitioner and the trial court (Pet. 6-7, 15, 16, n. 12; Pet. App. C, pp. 31-32; Pet. App. D, pp. 36-38)—in their assumption that the Department regulation pertaining to the production of subpoenaed materials in the Department's files in effect at the time of the

relevant proceedings was Supplement No. 2 to Order 3229, issued June 6, 1947. The latter regulation had been revoked and superseded by Revised Order 3229 of January 13, 1953 (18 F. R. 1368). The revised order directed[7] that "[w]hen a United States Attorney or any other officer or employee of the Department of Justice is served with a subpoena or order for the production or disclosure of materials or information contained in the files of the Department, the United States Attorney, or such other attorney as may be designated, will appear with the person upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the materials or information sought"; that "[t]ime will be requested within which to refer the subpoena or order to the Attorney General * * *"; and that "[i]n the event the court declines to defer a ruling until instructions from the Attorney General have been received, or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made will, pursuant to this order, respectfully decline to produce the material or information sought." (As we have indicated, the Department's instructions had been received by the United States Attorney prior to the return date of the subpoena.)

It was not until the day following the quashing of the subpoena, January 17, when the defendant filed

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[7] Revised Order 3229 has since been superseded (without pertinent change) by Order 260-62 of January 19, 1962 (27 F.R. 774).

a petition formally requesting the court to issue a subpoena duces tecum for the F.B.I.'s records, that the defense became more specific as to the papers in the file which it wished. It particularly desired, it stated, "signed statements of Yvonne Cochrane and Betty Sweet, alleged eyewitnesses to some of said events of August 8, 1960 * * *" (*supra*, p. 5). And at the trial, after Miss Sweet and Mrs. Cochrane had testified as prosecution witnesses, the defense, in renewing its request that the F.B.I. "[f]ile" in this matter be subpoenaed, qualified its request with the words "particularly with reference to the statement[s] given by these ladies." Counsel referred in this connection to "a discrepancy" which, he said, he believed existed between Miss Sweet's testimony and her statement to the F.B.I. with respect to the matter of which participant in the roadside affray struck the first blow (*supra*, pp. 6-7).

All of these exchanges occurred between the respective trial attorneys and the trial judge. No one was notified or present from the Department of Justice. At no time has a request for a particular document in the F.B.I. file been presented to any federal officer. The only demand with which the federal government has been confronted has been, as noted, the original blanket demand for practically the entire contents of a voluminous file relating to an ongoing investigation—a demand as to which the Department properly asserted privilege in the motion to quash the defense's subpoena. The Department has never been requested to consider whether, in the interests of

justice, the information contained in either Miss Sweet's or Mrs. Cochrane's statement to the F.B.I. should be made available to the court and counsel in the Pennsylvania prosecution.

The issues presented, therefore, would seem to be: (1) whether the trial court erred in denying a subpoena for specific documents which would have called upon the federal government to decide whether to furnish prior statements by witnesses in a State prosecution; (2) whether counsel distinguished between his initial catch-all demand and subsequent request with sufficient clarity to present the question to the trial court; and (3) whether the error, if any, was harmless, as held by the court below. Since no question of federal privilege or of the consequences of the assertion of a federal privilege is involved, the United States has no official interest in the case.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1964.

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In the

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October Term, 1963
No. 561

E. NEWBOLD SMITH,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

RESPONSE TO PETITION FOR CERTIORARI

OFFICE OF THE DISTRICT ATTORNEY
OF CHESTER COUNTY, PENNA.,
Court House Annex,
West Chester, Penna.

Murrelle Printing Company, Law Printers, 201-205 Lockhart Street, Sayre, Pa.
John J. Teti, Chester County Representative, Court House, West Chester, Pennsylvania

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RESPONSE TO PETITION FOR CERTIORARI

Respondent, at the request of the Attorney General of the Commonwealth of Pennsylvania, makes the following Response to the Petition of E. Newbold Smith.

COUNTER-STATEMENT OF THE CASE

The case which is the subject of this proceeding arose out of an arrest, indictment, trial and conviction of the petitioner, E. Newbold Smith, for the offense of assault and battery against a police officer in Thornbury Township, Chester County, Pennsylvania.

The offense, a misdemeanor under the laws of the Commonwealth of Pennsylvania, took place on August 8, 1960. Defendant was indicted by a Grand Jury on September 12, 1960, tried by a Jury which found defendant guilty on January 6, 1961.

Thereafter, defendant took steps in the County Court and the two appellate Courts of the Commonwealth of Pennsylvania, to have the conviction reversed but was unsuccessful; the last order being that of the Pennsylvania Supreme Court on August 7, 1963, denying petition for reargument filed by defendant and the American Civil Liberties Union.

OMISSION FROM PETITIONER'S STATEMENT OF THE CASE

On August 12, 1963, at about 7:30 p.m., petitioner, E. Newbold Smith, accompanied by his Attorney, John B. Hannum, Esq., voluntarily appeared at the Chester County Farms Prison and entered into compliance with the sentence of the trial Court which had imposed upon defendant a term of imprisonment of thirty days.

On August 13, 1963, defendant presented a Petition for Parole and the Court, by Judge Thomas A. Riley, fixed August 23, 1963 as the date for hearing on said petition.

On August 16, 1963 defendant petitioner was released on bail pending the filing by defendant's counsel, of a Petition for Certiorari in the Supreme Court of the United States.

COUNTER-STATEMENT OF QUESTION INVOL

Was petitioner denied due process of law becaus
trial Court refused his petition for a subpoena
tecum, directed to the Special Agent in Charge, Phil
phia Office of the Federal Bureau of Investigation
produce the records of an investigation into the fact
circumstances surrounding certain events of the nig
August 8, 1960"; said investigation having taken
after the incident for which petitioner stood trial and
investigation being the result of a complaint by petit
to the U. S. Attorney for the Eastern District of
sylvania alleging violation of his civil rights at the
Chester police station?

REASONS FOR NOT GRANTING THE WRIT

It should be noted preliminarily that the F. B. I. records petitioner sought, were statements allegedly taken from witnesses Sweet and Corcoran as a result of a complaint by petitioner to the U. S. Attorney for the Eastern District of Pennsylvania alleging violation of his civil rights at the West Chester police station. The federal indictment mentioned on page 4 of petition for certiorari and footnoted there as indictment No. 20686, concerns itself solely with events alleged to have taken place "in and about the premises of the police station in West Chester, Pa. . . ." The alleged events covered by the federal indictment transpired after the assault and battery charge on which petitioner was tried and convicted. The conviction of petitioner with which we are here concerned, involved the assault and battery on police officer Elliott at the cross-roads (intersection of Pennsylvania Routes Nos. 202 and 926); what followed at the police station had nothing to do with the instant case.

At trial, the victim, officer Elliott and defendant, Smith, accused each other of striking the first blow. It was the testimony of two women (Sweet and Corcoran), eye witnesses and completely disinterested, that supported the officer's testimony.

Each of the female witnesses had given the police a written statement of the cross-roads incident a few hours after it happened and these statements were given voluntarily to defense counsel by the District Attorney to aid them in the cross-examination of these witnesses.

There was a discrepancy between the testimony given by one of said witnesses at trial and in her written statement as to whether she actually saw who struck the first blow. Defense counsel cross-examined both of the witnesses thoroughly and vigorously on this inconsistency.

When the trial Judge inquired of defense counsel their reason for seeking the F. B. I. records, he was advised that the statements of one of the two eye witnesses (Sweet or Corcoran) allegedly obtained by the F. B. I. did not include "any observation of who struck the first blow." (pp. 97a, 98a).

Since the testimony offered from the witness stand and the written statements of the two witnesses furnished by the District Attorney pointed up the discrepancy and inconsistency which the defense was seeking to obtain from the statements taken from these witnesses by the F. B. I., it would necessitate considerable violence to logic to conclude that the petitioner was hurt by the denial. The record in the trial Court shows clearly that these witnesses were thoroughly and vigorously cross-examined on the very discrepancy and inconsistency for which the F. B. I. records were sought. Further the record shows on page 98a the following: "Mr. Hannum: If Mr. Rogers could use it, this would be in corroboration of her testimony or attack her credibility." Armed with the direct examination of these witnesses as given from the witness stand and their written statements as provided by the District Attorney, the requested result was obtained. The jury, however, resolved the issue against the respondent.

Petitioner relies on *Jencks v. United States*, 353 U.S. 657 (1956). It is respondent's position that *Jencks*, supra,

applies only to federal criminal prosecution and has no application to state criminal prosecutions. Further, as a result of the decision in *Jencks*, Congress enacted the "Jencks Law", 18 U.S.C.A. 3500, which provides inter alia, "(a) In any *criminal prosecution brought by the United States* . . ." (Emphasis added.)

See: *Com. v. E. Newbold Smith*, 412 Pa. 1, 4 (1963), citing *Palermo v. United States*, 360 U.S. 343, 345 (1959), footnote 2, noting that *Jencks* decision was based on the Court's power "to prescribe procedures for the administration of justice in the federal courts."

It is interesting to note that in *Jencks*, supra, the Government opposed petitioner's motion for production of statements of Ford and Matusow on the sole grounds that a preliminary foundation was not laid of inconsistency between the reports and testimony of the witnesses. The Government never asserted any privilege as to nondisclosure.

Petitioner's and the American Civil Liberties Union's complaint regarding the quashing of the original subpoena duces tecum and subsequent petition therefore, appears to be one of procedure rather than substance, i.e., that no sufficient reason existed for the refusal to issue the subpoena. It is claimed that the Attorney General did not instruct the assistant who appeared in Court to claim the federal privilege under the Department of Justice Order No. 3229.

Respondent, as well as petitioner, is unaware of what transpired in the office of the Attorney General after the subpoena was served. At trial, one James Kelley, an Assistant United States Attorney for the Eastern District

of Pennsylvania appeared before the Court and said, "This is an investigation by the United States Government and is confidential, and it is the position of the United States Government that the person served was the improper person to be served, and furthermore that this is a violation of the security of the office of the Department of Justice, and accordingly your Honor, I move that this subpoena be quashed" (page 24a).

Although there may not have been a verbatim compliance with the regulation, supra, for claiming a federal privilege, it is apparent that it was intended that the privilege against nondisclosure be claimed. It can only be assumed that in the subsequent denial of petition for subpoena, the trial Court had the previous claim of privilege in mind. The petitioner's position is apparently that the petition should have been allowed so that the privilege could again have been claimed by the Attorney General or a person acting on his behalf.

It seems clear that a state trial Court cannot force obedience of the subpoena if the refusal to comply is based on Department of Justice Order No. 3229. See: *People v. Parham*, 30 Cal. Rptr. 268, 273 (1963).

It is also clear that an employee of the Department of Justice refusing to produce records of his department upon the basis of Order No. 3229 cannot be held in contempt of court. See: *U. S. ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951).

As respondent views the petition for certiorari it is based tentatively on *Jencks*, supra, and upon alleged improper compliance by the U. S. Attorney's Office for the Eastern District of Pennsylvania with Department of

Justice Order No. 3229; all of which amounts to a denial of due process.

Respondent concludes that *Jencks*, case supra, augmented by the "Jencks Act," supra, and *Palermo* case, supra, applies only to criminal prosecutions in the federal courts; that the Department of Justice can assert a privilege against nondisclosure pursuant to Order No. 3229; that such privilege was properly asserted in this case; that contempt will not lie against the person asserting the privilege in federal courts; and that state courts are under the same disability.

On the question of governmental privilege, attention is directed to the "Jencks Act", supra:

> "(a) If the United States elects not to comply with an order of the Court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the Court may direct, the Court shall strike from the record the testimony of the witness, and the trial shall proceed unless the Court in its discretion shall determine that the interest of justice require that a mistrial be declared."

The defense did not request the trial Court to strike the testimony of witnesses Sweet and Corcoran.

Regarding the underlying theme of denial of due process, even if we assume that *Jencks* applies to state prosecutions; that the privilege against nondisclosure was not properly asserted; that the trial Judge erred in quashing the original subpoena and in refusing the subsequent petitions for subpoena duces tecum, how was petitioner harmed by nonproduction of the F. B. I. reports? The

statements given by the two witnesses to police after the incident the subject of indictment and trial and supplied to defense counsel by the District Attorney, also did not include an observation as to who struck the first blow. (The avowed purpose for which the F.B.I. statements were requested.) As stated earlier in this response, the defense had before them at time of cross-examination the very inconsistency between the testimony as given from the witness stand and the written statements, that is now asserted as the violation of due process. The statements taken by the F. B. I. were made after the events which were the subject of the state prosecution; as a result of petitioner's charge of alleged civil rights violation and were never in the possession of the state prosecutor.

For a recent case passing on the issue here raised, see *People v. Parham*, 30 Cal. Rptr. 268, 273 (1963).

CONCLUSION

For the above reasons the Commonwealth of Pennsylvania respectfully urges that the Petition for Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 561.

E. NEWBOLD SMITH,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES.

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Supreme Court of the United States.

OCTOBER TERM, 1963.

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E. NEWBOLD SMITH,

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Respondent.

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES.

At this Court's invitation, the Solicitor General of the United States filed a memorandum in the above-entitled case.[1] He advises the Court that the federal government never claimed a privilege as to Petitioner's narrowly drawn request for a subpoena to produce the F. B. I. statements of the two key witnesses (p. 11). Yet, the Pennsylvania court refused the subpoena solely because it *assumed* that such a claim had been made by the federal government and that an absolute federal privilege would prevent compliance with the subpoena. (See portion of Pennsylvania Supreme Court Majority Opinion, pp. 2-3, *infra.*) This is the precise error of which Petitioner complains.

1. Respondent, the Commonwealth of Pennsylvania, was requested to file a response to the Petition on or before February 5, 1964, which date was extended until February 18, 1964, but said response has not been filed.

The Solicitor General does not oppose certiorari. In fact, he points out that one of the federal issues before this Court is:

> ". . . whether the trial court erred in denying a subpoena for specific documents which would have called upon the federal government to decide whether to furnish prior statements by witnesses in a State prosecution." (p. 12)

And, on pages 6 and 7 of the Memorandum the Solicitor General notes that the trial judge below refused, even though properly requested, to issue a subpoena duces tecum requiring the F. B. I. agent to produce the prior statement of the two witnesses given to the F. B. I., or to come into court and claim a federal privilege, a privilege which the Solicitor General even now does not assert. He also admits that the F. B. I. has such statements (p. 7, Fn. 5).

There can be no doubt that the refusal of the Pennsylvania trial court to issue the subpoena directed to the F. B. I. agent, at the point in the trial *after* the two witnesses had testified, was solely and exclusively on the ground that the courts mistakenly believed a federal privilege had been asserted and that F. B. I. statements of the two key Commonwealth witnesses therefore would not be produced. For the Supreme Court of Pennsylvania, in its Opinion of July 2, 1963, describes the sole issue before it as follows:

> "At appellant's trial, each of the men maintained that the other was the instigator of the altercation. On this *key* factual issue, two women who were driving on the highway corroborated the police officer's testimony. At this point in the trial, appellant's counsel requested the trial judge to issue a subpoena duces tecum to compel the FBI to turn over statements given to it by the two women.[1] Upon being questioned as

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("1. The statements had been secured by the FBI during its investigation of appellant's claim that the arresting officers had violated his civil rights.")

to the purpose of this production, counsel replied that the statements given to the FBI did not include 'any observation of who struck the first blow' and thus could be used to impeach the testimony of the two women. *The trial judge refused to issue the subpoena after being informed by a representative of the FBI that the Bureau would not produce the reports because they contained confidential information, the disclosure of which would threaten the security of the Justice Department.*" (Emphasis supplied.) (Appendix A to Petitioner's Petition, p. 22)

The Solicitor General does not dispute the Petitioner's Questions Presented. He states merely that the Department of Justice never informed the state trial court that a federal privilege was claimed to the narrowly-drawn request. But the state court mistakenly thought that such a privilege had been asserted by the Department of Justice.

This is the precise error by the Pennsylvania court of which the Petitioner here complains. The wrong is particularly great because the Pennsylvania court mistakenly believed that the Department of Justice had claimed such a privilege and that an absolute federal privilege against production of F. B. I. statements exists (Appendix A to Petitioner's Petition, p. 22).

The Solicitor General of the United States indicates that that the federal government would consider the request if the subpoena is issued. He says:

> "The Department has never been requested to consider whether, in the interests of justice, the information contained in either Miss Sweet's or Mrs. Cochrane's statement to the F. B. I. should be made available to the court and counsel in the Pennsylvania prosecution." (pp. 11-12)

The error which occurred below was not harmless. *Fahy v. Connecticut*, No. 19, Oct. Term, 1963, 32 U. S. L. W. 4021 (December 2, 1963). As Petitioner here stated in his Petition:

> "Further muddying the waters, the Supreme Court of Pennsylvania moved on to a second point: that the case before it was distinguishable from *Jencks* since petitioner herein had been shown *other* completely separate and distinct statements made at a different time by the key prosecution witnesses to the local District Attorney. For that reason the Court concluded that petitioner herein, in contrast to *Jencks*, was not harmed by denial of access to the statements made to the FBI. This ground is seriously misleading. It seeks to draw a veil over a violation of petitioner's rights by treating it as 'harmless error.' Moreover, it is based on the sheerest speculation, since the contents of the statements to the FBI are *ipso facto* unknown, even to the Supreme Court of Pennsylvania. They might contain helpful additional evidence—they were alleged to contain contradictory statements not found in the other statements. In any event, the contents are irrelevant to petitioner's right to compulsory process.[10] Finally, the Court's reasoning would put in the hands of the state prosecutor a convenient and deadly discretionary device for depriving an accused of his constitutional right to obtain statements made by witnesses to the FBI simply by the proffer of some other statement,

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"10. Practically speaking, however, statements made to the FBI necessarily have considerable weight and importance. The FBI has formidable prestige and it is a federal offense, punishable by up to ten years imprisonment, to make false statements to an agency of the United States, 18 U. S. C. 80. See *Marzani v. United States*, 168 F. 2d 133 (D. C. Cir. 1948), *aff'd by an equally divided court*, 335 U. S. 895. Pennsylvania law provides no such penalty for statements rendered to State officers."

however unrelated or helpful, made to the prosecution by the same witness at a different time and under different circumstances."

For the reasons stated above, and as set forth in its Petition for Writ of Certiorari, Petitioner urges that the writ be granted.

Respectfully submitted,

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No. 561.

E. NEWBOLD SMITH,
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v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITIONER'S REPLY TO RESPONSE OF COMMONWEALTH OF PENNSYLVANIA.

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Respondent.

PETITIONER'S REPLY TO RESPONSE OF COMMONWEALTH OF PENNSYLVANIA.

The Response filed by the Commonwealth supports one of Petitioner's reasons why certiorari should be granted. The Commonwealth asserts that a federal privilege was properly claimed by the F. B. I. (p. 8)—differing with the Solicitor General who states that a federal privilege was never invoked by the Department of Justice even though the trial court thought it had—and that "in the subsequent denial of petition for subpoena, the trial court had the previous claim of privilege in mind" (p. 7). Petitioner agrees, and has contended throughout, that this is exactly what happened—the trial court refused to issue the subpoena because of its mistaken assumption regarding the proper claim of federal privilege.

The Commonwealth's Response reveals the widely held belief by state prosecutors and state courts that

F. B. I. statements, however relevant, are immune from court process merely upon the assertion of a privilege by the F. B. I. This is the error which only this Court can change by granting certiorari, hearing argument and then reversing. Certainly it would be unfair to force petitioner to spend 27 days in jail[1] and to suffer the stigma of a criminal conviction when everyone now concedes that the Pennsylvania Court rejected petitioner's claim solely on the mistaken notion that the F. B. I. had claimed a federal privilege and that the mere claim thereof foreclosed any inquiry by the trial court.

The Commonwealth's contention that the error was harmless, since petitioner was given two separate and distinct statements taken by the District Attorney at a subsequent time, is clearly without merit. As was pointed out in the Petition for Certiorari (p. 14) and Petitioner's Response to the Memorandum for the United States (p. 4), a contention of "harmless error" is based (1) on Commonwealth speculation that the F. B. I. statements do not contain material helpful to the Petitioner's defense which was not in the District Attorney's statements (neither Petitioner nor the Court has ever seen the F. B. I. statements which admittedly exist) and (2) denies the greater efficacy reasonably expected from statements given to the F. B. I. The statements of the witnesses in the possession of the Commonwealth's District Attorney were taken by the local police from witnesses who later refused to discuss the case with defendant's counsel prior to the trial under circumstances which strongly suggested the witnesses' bias and interest in favor of the Commonwealth. Certainly there is every inference, therefore, that the F. B. I. statements would be much more helpful to the defense.

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1. Commonwealth's Response stating that Petitioner presented a Petition for Parole (p. 2) tends to confuse this point. If certiorari is not granted, the Petitioner must go to jail.

For the reasons stated above, and as set forth in its Petition for Writ of Certiorari, and Response to Memorandum for United States, Petitioner urges that the writ be granted.

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